APPEAL FROM THE OAKLAND COUNTY CIRCUIT COURT
HON. DENISE LANGFORD-MORRIS

IN THE SUPREME COURT

BANK OF AMERICA, N.A.,

Plaintiff/Appellant,

v

FIRST AMERICAN TITLE INSURANCE COMPANY; PATRIOT TITLE AGENCY, LLC; KIRK D. SCHIEB; WESTMINSTER ABSTRACT COMPANY d/b/a WESTMINSTER TITLE AGENCY, INC.; THE PRIME FINANCIAL GROUP, INC.; VALENTINO M. TRABUCCHI; PAMELA S. NOTTURNO, f/k/a PAMELA S. SIIRA; DOUGLAS K. SMITH; JOSHUA J. GRIGGS; NATHAN B. HOGAN; STATE VALUE APPRAISALS LLC and CHRISTINE D. MAYS,

Defendants/Appellees,

And

FRED MATSON, MICHAEL LYNETT, JO KAY JAMES, and PAUL SMITH,

Third-Party Defendants.
_____/

Supreme Court Case No. 149599

Court of Appeals Docket No. 307756

**DEFENDANT/APPELLEE WESTMINSTER ABSTRACT COMPANY d/b/a WESTMINSTER TITLE AGENCY, INC.'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

Defendant-Appellee Westminster Title agrees this Court has jurisdiction.

## STATEMENT OF QUESTIONS PRESENTED

I. **DO THE CLOSING INSTRUCTIONS FOR ENID AND HERON RIDGE CREATE A CONTRACT BETWEEN BOA AND WESTMINSTER TITLE?**

Plaintiff-Appellant says the answer is "yes".

Defendant-Appellee says the answer is "no".

A. BOA accrues no rights directly against Westminster on account of the CPL.

B. There is no contract claim in this case.

1. The language of the Closing Instructions does not describe a duty to prevent fraud.

2. The Complaint in this case does not state a cause of action for anything, let alone the prevention of fraud

A. Many of the factual assertions in the Complaint are false.

3. There was no intention on the part of Westminster Title to accept a duty to prevent fraud by virtue of accepting the Closing Instructions.

4. Westminster Title did everything it was required to do under the Closing Instructions for Enid and Heron Ridge.

5. There is no relationship between the alleged efficiency of Westminster Title and the damages sustained by BOA.

A. BOA is solely responsible for the damage consequences in this case.

II. **THE RULE THAT THE DISCHARGE OF THE BANK'S MORTGAGE SECONDARY TO A "FULL CREDIT BID" AS DEFINED IN *NEW FREEDOM V GLOBE MORTGAGE*, 281 Mich App 63; 761 NW2d 832 (2008)**

A. BOA's own inequitable behavior demonstrates the necessity for the rule.

## INTRODUCTION

Bank of America seeks to recover money it claims it paid for the fraud of others. The only person whose conduct was not measured in its Brief was its own. This is not to say that any person deserves to be defrauded but the approval of mortgages was and is Bank of America's stock and trade. It was the origination of the mortgages, not the closings that were the root of the problem. There were many fraudulent mortgages issued during this period of time. Patriot Title closed some, Westminster Title closed some and hundreds, if not thousands of other title companies closed other fraudulent mortgages issued by Bank of America. The common denominator was that they were all underwritten by Bank of America.

The mortgage fraud scandal was fueled by greed. The mortgages issued by Bank of America were bundled and sold as securities. It was profitable. The more mortgages that were processed the more money came in the door. Ultimately caution and good business practice were thrown to the wind. Mortgage processing spun totally out of control and many of the mortgages that backed the securities were of low, if not terrible, investment quality. Bank of America represented them to be solid and in doing so besmirched its good name, rebranding itself an icon of American greed. The United States Department of Justice in *Justice.gov* reported in its release announcing the settlement of its claims against Bank of America for a record $16.65 Billion Dollars:

> "The settlement includes a statement of facts, in which the Bank acknowledged that it sold billions of dollars of FMBS without disclosing to investors key facts about the quality of securitized loans.
>
> The bank has also conceded that it originated risky mortgage loans and made misrepresentations about the quality of these loans to Fannie Mae, Freddie Mac and the Federal Housing Administration.

> Even reputable institutions like Bank of America caved to the pernicious forces of greed and cut corners, putting profits ahead of their customers." Exhibit 1

Westminster Title stands on its own in this case. The decisions of the lower courts have found no wrongdoing on its part. Judge Murphy, in his Dissenting Opinion in the Court of Appeals said there was enough evidence to submit Westminster Title's liability to the jury but was not kind enough to describe the evidence which supported his conclusion. It is apparent to Westminster Title that this Court wishes to review the holding of *New Freedom v Globe Mortgage,* 281 Mich App 63; 761 NW2d 832 (2008). Certain parts of that decision are supportive of the position of Westminster Title. Westminster Title does not, however, rely on that case as its primary defense. It has succeeded thus far because the claims against Westminster Title have never been substantiated to the extent that there was a question for the jury. The Supreme Court will consider policy arguments in its deliberations about the fate of *New Freedom, supra* but it will also have to consider the nuts and bolts issue of whether there is a breach of contract issue pled that was sufficiently supported by evidence against Westminster Title.

There is a serious question underlying BOA's fundamental contention that Westminster Title failed to provide information that would have caused it to discover the fraud and that is "even if Westminster Title had an obligation to provide it, would BOA have done anything about it?" The answer is "no, certainly not at the time these mortgages were made." Support is easy to find for this conclusion. The settlement agreement BOA made with the Federal Government demonstrates BOA was in the securities business when it was supposed to be in the mortgage business. It was not interested in quality mortgages, it was interested in representing the mortgages were quality (investment grade). It is also supported in this case by its actions in the Enid Street

closing. When the closing was stopped by Westminster Title and BOA was informed of the change of the identity of the seller, BOA did less than nothing to find out if there was something amiss.

## COUNTER STATEMENT OF FACTS

### *A. The Entities Involved.*

The issues before this Court involve real estate transactions for four Michigan properties. Several different entities were involved in the closing of these properties. In order to fully appreciate these transactions, it is critical to understand the role that each party had to each parcel of property.

These transactions were closed by two different closing agents. Defendant-Appellee Westminster Title Agency, Inc ("Westminster Title") was the closing agent for the properties at 13232 Enid Street in Fenton, Michigan ("Enid") and 1890 Heron Ridge in Bloomfield Hills, Michigan ("Heron Ridge"). Defendant-Appellee Patriot Title Company, L.L.C. ("Patriot Title") was the closing agent for 1766 Golf Ridge Drive in Bloomfield Township, Michigan ("Golf Ridge") and for 1550 Kirkway Road in Bloomfield Township, Michigan ("Kirkway"). The closing of the mortgages with Westminster Title were in conjunction with the sale of the property.

Common to all of the transactions was Prime Financial Group ("Prime"), the mortgage broker; Bank of America ("BOA"), the mortgagor; and First American Title Insurance Company ("First American"), the title insurer. BOA, as the lendor, provided financing and was directly and singularly responsible for determining the eligibility of mortgage applicants. First American was the title insurance provider. It insured the title, literally. The title insurance policy assured the owner was as represented and that there were no liens (such as for material men or taxes) with a superior position to BOA.

Westminster Title was the agent of First American. There existed an agency contract between First American and Westminster Title dated November 1, 2003. (1185 JA). First American appointed Westminster Title as its agent in fact. (1185 JA, sec. 1). It required Westminster Title to comply with its rules and regulations. (1185 JA, sec 2b). Westminster Title was required to counter sign all policies it issued for First American as its designated agent. (1186 JA, sec 2d). It issued the title insurance policies for First American and was required to provide it with copies of the same. (1188 JA, sec 4b). Westminster Title indemnified First American for its torts including fraud. (1190 JA, sec 13a).

Westminster Title's job was to adjust, collect, and disburse funds; officiate the transfer of deeds; and obtain signatures on the closing documents. (274 JA) The services provided by Westminster Title were part and parcel of its principal's assurance of BOA's security position in the real estate. Under no circumstances was Westminster Title responsible for underwriting the loans of Fred Matson and Jo Kay James.

Plaintiff-Appellant's Brief on Appeal discusses at length the Closing Protection Letters. The Closing Protection Letters will be addressed in detail later, however, at this point the Court should understand that those letters were not indemnities given by Westminster Title. The indemnity was given by First American to BOA. (274 JA)

### *B. The Enid Street Transaction.*

The buyer of the Enid property was Fred Matson. Fred Matson was an integral part of the frauds perpetrated in this case. His credit was used to obtain a mortgage to purchase a residence

that he had no cognizable means of affording. The documents that he executed at the closing attest to his willingness to lie and cheat.

Fred Matson's mortgage Application was fiction. Mr. Matson lists investment assets totaling $5.9 Million Dollars and represented that he was making $96,659 per month. (1298 JA). He signed and dated the Application attesting to its accuracy. (1301 JA). The residence appraised for over $5.5 Million Dollars, which was also false. (1302 JA).

Despite the overwhelming misrepresentations contained in his mortgage Application, BOA provided Mr. Matson with a loan totaling $3,850,000. He was credited with a deposit of almost $2,000,000. (905 JA). He signed his name attesting to the correctness of the document. (908 JA). Mr. Matson's mortgage was approved without challenge on December 29, 2005. (1316 JA).

BOA did nothing to substantiate the representations in Mr. Matson's mortgage Application. Vicky Olsen, a BOA supervisor, testified that the loans were called "stated value" loans. This means that BOA did nothing to verify the numbers (assets and liabilities) listed on the mortgage Application. According to Ms. Olsen, the Application "was verified through an oral statement from the customer," meaning not verified at all. (1309 JA, pp. 23 through 1310 JA). Lavada Miller, another BOA underwriter, agreed that BOA did nothing to confirm the representations contained on the mortgage Application and, instead, relied on applicant's "certification" that the information was true. (1313 JA, p.19).

The seller of the Enid property per the HUD-1 was Raji Zaher, who appeared as the owner of record. (1317 JA) The closing for the Enid property was scheduled for December 30, 2005.

In anticipation of the closing, the HUD-1 had previously been approved by BOA. (1324 JA). The Closing Instructions were sent in two packets by fax. The "Conditions" arrived on December 29, 2005. (1328 JA). The boiler plate Instructions arrived on December 30, 2005 at 7:12 a.m. (1332 JA).

Linda Dolan, the manager of Westminster Title's Novi office, attended the closing on behalf of Westminster Title. When Ms. Dolan started the closing, she learned for the first time that the seller of the Enid property was not Raji Zaher and that the HUD-1 was incorrect. (1340 JA, p. 22) Ms. Dolan learned that there was an unrecorded vendee's interest in a land contract that was not accounted for in the documents, per her deposition testimony. (1338 *et seq* JA). In light of this new information, Ms. Dolan stopped the closing and advised her associate, Shelly Maxwell, to contact BOA. (1341 JA, p. 27)

Shelly Maxwell called Kawannah Clifton, the closing representative at BOA, and advised her that Mr. Zaher was not the appropriate seller of the Enid property. Ms. Maxwell then followed up the telephone discussion by faxing Ms. Clifton all the information they had about the seller. (1346 JA). Ms. Clifton then confirmed notice to her by approving the amended HUD-1 that was used at the closing in writing. (926 JA, p. 19) The way this was done conforms to the letter with the recommended procedure contained in the ATLA closing procedures. (1619 JA). Ms. Maxwell's actions also conform with the recommendations of First American, as sworn to by Kimberly O'Connor. Ms. O'Connor testified that the procedure when a double escrow is discovered is to notify the Bank in writing and obtain an acknowledgement from the Bank in

writing as well. This practice is based on the underwriting directives issued by First American from 1998 and 2004. (0423 JA).

The Enid property was not a traditional "double escrow." A double escrow, according to the underwriting directives, involves property that is acquired and sold in a very short period of time and then sold to another who does not know about the first transaction. (366 JA). Here, the unrecorded land contract interest was discovered while all of the parties were at the closing table, so the ultimate buyer was aware of the first sale. Moreover, flipping property with double escrow is not a crime, is not illegal, and is not immoral. (655 JA; article "The Truth About 'Flipping' Real Estate" and deposition of Kimberly O'Connor, 422 JA). However, the use of a double escrow is the type of transaction that should be scrutinized. (*Id.* 656).

Once it learned of the double escrow, BOA did nothing with this information. Ms. Clifton did not refer the matter back to underwriting. She merely directed that the title issue be corrected with a quit claim deed. (1353 JA, p. 42). Ms. Clifton then acknowledged and approved the new HUD-1. (1353, JA p. 43). When questioned about the transaction, Ms. Clifton did not recall exactly what changes were made. (1353 JA, p. 43).

It appears that the revised HUD-1 was in Ms. Clifton's possession by 11:31 or 11:38 a.m. on December 30, 2005. (1322 JA; 1362 JA). Moments later, by 11:40 a.m., BOA had wired the money to Westminster (1368 JA). The boilerplate Closing Instructions were wired by BOA to Westminster Title at 11:57 a.m. The new Closing Instructions showed Michigan Development as the seller, not Raji Zaher. (1370 JA). The changes were approved by BOA in minutes. (1353-1354 JA, pp. 41-45). This was consistent with the policy of BOA to close these mortgagers fast. (1360

JA, p.82). To facilitate the quick closing of this loan, Ms. Clifton authorized Westminster Title to obtain a Quit Claim Deed to adjust the title and then have a Warranty Deed for the sale. (1348 JA). Ms. Clifton provided these instructions to a Westminster Title employee named Jodie Berbas. (1374 JA).

The deeds requested by Ms. Clifton were prepared and executed as directed at the closing on December 30, 2005. (1377 JA). Mr. Matson participated in the closing as if he was actually a bona fide purchaser. He produced his driver's license, which identified him. (1380 JA). He signed a statement stating that he was going to live in the house. He then warranted this statement as true in an "estoppel certificate." (1382 JA). A copy of the deposit check was also produced, which showed the down payment had been made. (1386 JA). As Ms. Clifton testified at her deposition, confirmation of the existence of the deposit was the responsibility of BOA, not Westminster Title. (1348 JA) Vicky Olson concurred. (1310 JA, p.32) Lavada Miller did as well. (1314 JA, p. 24). Once completed, the executed papers were returned to Ms. Clifton. Nothing more was ever said about the closing until Mr. Matson defaulted. (1348 JA, pp. 50, 51, 65, and 66). If BOA had objections upon review of the closing documents, it had plenty of time to stop the payments. The checks were not issued until January 4, 2006: a full five days after the closing. BOA, however, never objected to the closing until Mr. Matson's fraud was discovered. (1387 JA).

Ms. Clifton admitted she had handled situations like the Enid closing before (1348, JA p. 77). She was comfortable with the time period in which the problems were adjusted. (1348, JA p. 76).

The Complaint filed by BOA in this case contains several statements concerning the Enid closing that are notoriously false. For example, the Complaint asserted that Westminster Title was responsible for the fact that BOA could not verify the existence of the earnest money deposit. (55 JA, ¶ 67) This was not the responsibility of Westminster Title, as shown above. BOA claimed that Westminster Title engaged in a contemporaneous sale of the same property and concealed the same from BOA. (56 JA, ¶ 71) This is totally false and the Michigan Court of Appeals stated as much on pages 14 and 15 of its Opinion. BOA claimed that Westminster Title withheld its knowledge that Mr. Matson was not going to live in the property. (57 JA, ¶ 76 and 77) Actually, Mr. Matson warranted that he was going to live in a residence in the Estoppel Certificate which bears his signature. There is no proof that Westminster Title could or should have known anything but that. Lastly BOA alleges that Westminster Title knowingly concealed the fact that the home was under collateralized. (57 JA, ¶ 75) BOA was well aware, based upon its investigation in 2006, that Westminster Title did not order nor choose the appraisers (Prime Financial did) and, by virtue of that had no more reason to know about the exaggerated appraisals than did Bank of America.

### *C. The Heron Ridge Transaction.*

The buyer for the Heron Ridge transaction was Jo Kay James. Ms. James breezily explained at her deposition that she was recruited by a person who told her that she was joining a legitimate investment group that bought and sold houses. (1408 JA, p. 74). Ms. James knew that

she was going to own the property but she thought that it would only be for a few months. (1408 JA pp. 52 and 59). Her shtik was that she was "kind of naïve and, well, shall we say dumb and I did everything they asked me to do." (256 JA, p. 19). At the end of the day, Ms. James was loaned $2.8 Million Dollars by BOA.

Ms. James signed a mortgage Application that stated that she made $71,328 a month as an owner of Great Lakes Glove and Safety in Commerce, Michigan. She represented to BOA assets and stocks valued at $5.4 Million Dollars. These numbers were outstandingly false. Ms. James testified in her deposition that she thought she was buying a different property up to the date of closing, (1408 JA). However, the mortgage Application, which she signed on December 19, 2005, (about 45 days before the closing on January 31, 2006) clearly described the Heron Ridge property on the front page of the Application so that statement was false. (1389 JA). The Heron Ridge loan was likewise classified as a "stated value loan." BOA did nothing to verify Ms. James' representations about her false claim to earnings and assets. (1304 JA, pp. 24 and 25).

The closing for Heron Ridge was unremarkable. The Closing Instructions were provided by BOA for the closing. (1398 JA). There is no prohibition about second mortgages contained in Closing Instructions. The deposit was verified by a Xerox of a check, which had already been verified by BOA. The mortgage was closed, and the funds were distributed on January 31, 2006. (1406 JA).

Jo Kay James acknowledged she signed a lot of documents at the closing but testified that she did not know what most of them were for. She signed "her life away" without knowing what she signed. (1408 JA, p. 48). She acknowledged that she saw her financial information at the closing but claimed that BOA must have had problems getting her financials because the

documents indicated she had millions of dollars that she did not have. (Id., p. 47). Ms. James also acknowledged that she signed the Estoppel Certificate, wherein she warranted that she was going to live in the house. (1421 JA; 1408, JA p. 67).

Ms. James testified that she was told by Carol Walsh, from Prime Financial, that her house would soon be purchased by another buyer. Ms. Walsh attended the closing. ( Id., p. 45). In the end, Ms. James was paid $20,000 for her participation in the sale. (1408 JA, p. 57) The person who paid her the money required her to hand write a note saying that she was purchasing the property for more than it was appraised for (1419 JA, p. 74). Jennifer Maier-Brigmon, who attended the closing for Westminster Title, believed the deal was legitimate. She thought Ms. James was going to live in the house. (1425 JA)

In its Brief on Appeal, BOA frequently discusses the second mortgage that was part of the Heron Ridge transaction. That second mortgage, touted by BOA as significant, has no bearing on the issues in this case. According to BOA's own records, Ms. James had already made the down payment before the first or second mortgage was closed. The second mortgage had nothing to with the deposit to total ratio, therefore. Individuals are free to take out second mortgages or third mortgages without the permission of the primary mortgagee. In fact, the Closing Instructions say nothing about second or third mortgages. BOA has no reason to care if those mortgages exist, as long as it has the first security position on the title.

Many of the allegations in BOA's Complaint concerning Heron Ridge are false. The Complaint alleges that Westminster Title did not confirm the existence of the earnest money deposit. (61 JA, ¶ 95). As demonstrated, this was a responsibility of BOA. The Complaint

alleges that Heron Ridge was a "second-generation flip" (without explaining what made it "second-generation"). The assertion is that Westminster Title somehow knew about the first closing which happened the prior May. (61 JA, ¶ 96, 98). The prior sale was at a different location with completely different individuals. Mr. Conte, the buyer at the May transaction said he never heard of Westminster Title before he attended the closing with Ms. James in January of 2006. (863 JA, p. 12). The Complaint also alleges Westminster Title knew that Ms. James was not going to live in the house as a resident. (62 JA, ¶ 99). The file in BOA's possession at the time that it filed its Complaint shows that she warranted just the opposite in the Estoppel Certificate and, in addition made a handwritten statement to the same effect. (1421, 1423 JA). Lastly, the Complaint alleged there is something untoward about accepting a check from Patriot Title as part of the purchase proceeds at the closing on January 31, 2006. (58 JA, ¶ 80). This was a baseless contention which is demonstrated on the face of BOA's Complaint. Patriot Title was an active participant in the Kirkway property mortgage fraud. (58 JA ¶ 96 and 97). The mortgage for that property was approved on January 31, 2006, the same day the Heron Ridge property closed. BOA would not have approved a mortgage involving Patriot if it had the slightest notion it was "dirty." If it did not know, Westminster Title did not know.

### *D. The Result.*

Shortly after the closings of the Enid and Heron Ridge properties, the respective buyers defaulted on their mortgage obligations. BOA then took a closer look at Ms. James and Mr.

Matson – something it should have done months before. Wendell Fox, an investigator for BOA, conducted an interview and collected the closing files for the two closings on August 22, 2006. (516 JA, pp. 20; 523 JA, p. 47). Nothing was done and the matter was closed as far as Westminster Title was concerned. BOA continued to do business with Westminster Title.

In August of 2009, a United States grand jury subpoenaed the closing records of Westminster Title. (Id. at p. 18). Nothing became this either. Westminster Title continued to close mortgages for BOA, and does so today. The representations about criminal convictions in BOA's Brief do not include Westminster Title or any representative of that organization.

## STANDARD OF REVIEW

The issues raised in this appeal arise from the Trial Court's grant of Defendant-Appellant's Motion for Summary Disposition, which was brought pursuant to MCR 2.116(C)(8) and (C)(10). This Court reviews such decisions *de novo*. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003).

Since the Trial Court and Court of Appeals considered factual evidence outside of the pleadings in rendering their decisions, the appropriate standard is that contained in MCR 2.116(C)(10). In evaluating a motion for summary disposition brought under this subsection, the Court may consider affidavits, pleadings, depositions, admissions, and other admissible evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id, see also Quinto v Cross & Peters*, 451 Mich 358; 547 NW2d 314 (1996).

"Under MCR 2.116, it is no longer sufficient for plaintiffs to promise to offer factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted." *Smith v Globe Life Insurance Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The reviewing Court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing Court may not employ a standard citing the mere possibility that the claim

might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Maiden, supra* at 121.

The interpretation of a contract is likewise reviewed *de novo* is a question of law. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The primary goal of contract interpretation is to enforce the party's intent as expressed in their written agreement. *Zürich Ins Co v CCR & Co, (on rehearing),* 226 Mich App 599, 603-604; 576 NW2d 392 (1998). If the claim in the complaint is clearly unenforceable, the case must be dismissed its allegations do not justify a right to recover. *Fidelity and Deposit Company of Maryland v Newman*, 109 Mich App 620, 623; 311 NW2d 821 (1999). The Michigan Court of Appeals held in the matter of *Formall Inc v Community National Bank of Pontiac*, 166 Mich Apps 772, 779; 421 NW2d 289 (1989), that a complaint that states a claim that is at variance with the facts is not sustainable. In this case, BOA did not amend its Complaint after it knew the facts were at variance with the Complaint's allegations.

## LEGAL ARGUMENT

### I. A SEPARATE CONTRACT DID NOT EXIST BETWEEN BANK OF AMERICA, THE LENDER, AND WESTMINSTER TITLE, THE CLOSING AGENT.

#### *A.* *There are two writings of importance.*

##### 1. The Closing Protection Letters

Closing Protection Letters were issued by First American to BOA for each of the properties. (CPL) (1291-1297 JA) The "Closing Protection Letter" (CPL) is an indemnity agreement, not an insurance policy. *JP Morgan Chase Bank, NA v First American Title Ins Co,* 795 F Supp2d 624, 628 (ED of Mich 2011). It is an inducement extended by the title insurance company to encourage customers to purchase its product. *Id*, pp. 629-630. It verifies the agent's authority to issue the underwriter's policy's and makes the financial resources of the national title insurance company available to indemnify lenders and purchasers for the local agents errors or dishonesty with escrow or closing funds. *New Freedom, supra.* The assurances in these Letters are in addition to the assurances provided in the policy of title insurance issued by First American to BOA. The Closing Instructions from BOA to Westminster Title for both properties say:

> "An insured closing letter is REQUIRED. If required, and insured closing protection letter in the form authorized by ALTA must be issued in connection with the closing and settlement of any loan through an issuing agent or to an attorney approved issue title insurance for the title insurance company. All issuing agents and approved attorneys should confirm that such a letter is on file with lender before closing the loan. (Emphasis supplied).

The CPL letters for Enid and Heron Ridge describe the acts of Westminster Title ("issuing agent") for which First American provides indemnity. First American was to indemnify BOA for losses sustained on account of:

> "(1) failure of the Issuing Agent to comply with your written closing instructions to the extent they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you but not to the extent that said instructions required determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds do you or, (2) Fraud or dishonesty of the Issuing Agent handling your funds in documents connection with such closings. (1291-1292 JA)

BOA's claims in this case deal with (2) only. (1125 JA)

**2. The Closing Instructions.**

The underwriting Instructions for both properties are included as part of the Joint Appendix. (Enid-1329-1337; Heron Ridge 1399-1405 JA). BOA contends they constitute an independent contract between Westminster Title and BOA which, according to BOA's arguments, protects BOA from frauds such as occurred for these two properties. Westminster Title resists any claim that such a contract exists. There was no meeting of the minds between BOA and Westminster Title that the Closing Instructions were an anti-fraud or fraud detection device. The employees of BOA deposed in this matter did not agree with the position of BOA. Kawannah Clifton, the closing officer of BOA was asked what the purpose of the Closing Instructions were at pages 80 and 86 of her deposition. She testified that the purpose of the Closing Instructions was to make sure the Bank's lien was first in line and Westminster Title had to follow them for that reason. She did not suggest they were for any of the theories proposed by BOA in this case. (1359; 1361 JA)

The only claim that BOA did make against Westminster Title pursuant to the CPL was fraud. It originally pled a claim for fraud in its Complaint, but nonsuited it, leaving only the claim

for breach of contract. (246 JA). The Michigan Court of Appeals reviewed the transactions and found no proof of fraud. (15 JA, pp. 14 and 15). This holding is supported by Westminster Title. It strongly believes the facts it has presented demonstrate it is a true and correct decision in this case.

Westminster Title's duty to comply with the Closing Instructions is defined in Section 1 (A) of the CPL and limited to the "extent they relate to (A) the status of the title [to the property] or the validity, enforceability and priority of [BOA's] mortgage.... Or (B) the obtaining of any other document, specifically required by [BOA].... Or (C) the collection payments of funds due [BOA]. This is not to say that the CPL is the source, or only source of the closing agent's duties. They are the duties of closing agents and which are also contained in the CPL. The Michigan Court of Appeals on page 16 determined that if there was a separate contract based upon the Closing Instructions there was no link between the alleged breach of contract by Westminster Title and the damages BOA claimed. (15 JA, p. 16). Westminster Title refines this argument somewhat. It says that the reason that the claims of BOA cannot be linked to the damages claimed by BOA is because there was no meeting of the minds between BOA and Westminster Title that the Closing Instructions were an "anti-fraud" device as BOA says they are. Westminster Title submits their purpose was to assist Westminster Title in the performance of its duties described in 1(a) quoted above. Certainly that is what they say. BOA cannot point to language which shows their purpose is to prevent or discover fraud. BOA cannot show that it ever informed Westminster Title that it had adopted stated mortgage underwriting (called "liar loans") and was not verifying the financial information in the mortgage Applications, thereby enhancing the possibility of mortgage fraud.

**B.** ***The Law of Principal –Agency creates no rights in BOA on account of the CPL it was given by First American***

Each of the parties had a role in the Enid and Heron Ridge closings. BOA was the mortgagee. It had the responsibility of underwriting the qualifications for the loan and then funding the mortgage if it found the request for loan was acceptable. First American was the title insurance company. It insured the title and BOA's position as first secured in the event of default. Westminster Title was the agent of First American. It placed the title insurance with First American and was its functionary for the purpose of providing the title was good and BOA's security was as it should be. Years ago lawyers prepared the closing papers and deeds but that time has gone by the wayside. Westminster Title performs the services as part of the package of services delivers.

BOA concedes that Westminster Title is the agent in fact of First American. (52 JA, ¶ 50). BOA argues the circumstances surrounding the process of closing these mortgages support its contention that the Closing Instructions constitute an independent contract between BOA and Westminster Title. This is the only possible contract BOA can have with Westminster Title because there exist no claims against Westminster Title based upon the language of the CPL. Pursuant to MCL 500.1212, an insurance agent must be contractually designated as an insurance company's "agent in fact" before it can place policies as an" issuing agent." In this particular case there was a written agency contract which existed between First American and Westminster Title which said Westminster Title was First American's "agent in fact." (1433 JA). The law of Michigan says that an agency contract does not vest rights in third parties. *Uniprop v Morgenroth*, 260 Mich App 442, 446; 678 NW2d 638, (2004) and *Koppers Co, Inc v Garling*, 594

F 2d 1094 (CA6, 1979). BOA must maintain its claim for breaches of the CPL by Westminster Title against First American. It has no direct right under the CPL against Westminster Title. *Huizenga v Withey Shephard*, 15 Mich App 28, 633; 167 NW2d 120 (1969). This means two things. First, if there is no fraud shown on the part of Westminster Title, the CPL has nothing to do with this case for the Enid and Heron Ridge closings. Second, BOA must make sense of its direct claim of breach of contract based upon the Closing Instructions. It does not make sense as will be shown next.

### *C. Plaintiff-Appellant's Breach of Contract Theory.*

Plaintiff-Appellant's Complaint is poorly drafted. It pleads conclusions without the benefit of facts. BOA's only claim against Westminster Title is for breach of contract, but there is no description of the agreements between BOA and Westminster Title described in the Complaint. BOA relies only on a unilaterally provided set of Closing Instructions. BOA asserts that the Closing Instructions are a contract. It makes this assertion despite proof of mutual assent (a meeting of the minds), which is a necessary element of a contract. The Closing Instructions are not a contract, and they certainly are not a contract to prevent or detect fraud. BOA does not identify any language that says this.

The dispute about the existence of a contract between BOA and Westminster Title has been the issue in this case since day one, in part because of the weak Complaint. It is not unusual for a Complaint to contain allegations that are later adjusted to conform with facts brought forth in discovery. This is one purpose for amendments of pleadings. However, BOA's Complaint

contains statements that fly in the face of clear and unequivocal evidence to the contrary. BOA refused to amend its allegations. Recall that BOA conducted a thorough investigation in 2006, long before its Complaint was filed. BOA knew at that time, and knows today, that Westminster Title and/or its representatives received no money nor benefits in the forms of kickbacks or otherwise from these closings. It received its standard fee, nothing more. Despite this, BOA pursued the motiveless claim of fraud in the harshest of terms. BOA continues in its incredible assertions by claiming that Westminster Title and its representatives should be charged with crimes for their activities in these two closings. (Plaintiff-Appellee's Brief on Appeal, pp. 23, 40).

Since BOA has never amended its Complaint, the allegations stand as filed and must be evaluated so.

### *1. **BOA Failed to Prove a Contract Between BOA and Westminster Title.***

Plaintiff-Appellant's allegations concerning the alleged breach are found in paragraphs 119, 121 and 122, 67 JA. Paragraph 119 alleges that there was a contract between the title agents (Westminster Title) and BOA "that is defined by Bank of America's Closing Instructions." *Id.* Paragraph 121 then asserts the title agent "violated the parties' agreement by failing to adhere to the Closing Instructions." *Id.* Paragraph 122 then alleges that "[t]he Closing Instructions required, *inter alia*, that the identity of all payees appear on the HUD-1. The Title and Settlement Agents disbursed Bank of America's funds to payees not identified on the HUD-1's." *Id.*

These Closing Instructions do not create a contract between BOA and Westminster Title. A valid contract has five elements: (1) parties competent to contract; (2) a proper subject matter;

(3) a legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *AFT Michigan v Michigan*, 303 Mich App 651, 659; 846 NW2d 583 (2014).[1] BOA, as the party claiming a breach of contract, has the burden of proving (1) that there was a contract[2], (2) that Westminster Title breached the contract, and (3) that BOA suffered damages as a result of the breach. *AFT Michigan, supra* at 659 quoting *Miller-Davis Co v Ahrens Constr, Inc, (on remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012).

Mutuality of agreement, or a meeting of the minds, is an essential element of every contract. "There must be a meeting of the minds on all the material facts in order to form a valid agreement, and whether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts."[3] Mutual assent is the agreement of the contracting parties for the same enterprise. *Goldman v Century Insurance Co*, 354 Mich 528, 534-35; 93 NW2d 240 (1958). See also *Stark v Kent Products, Inc,* 62 Mich App 546, 548; 233 NW2d 643 (1975).

BOA's assertions regarding the Closing Instructions is a factual over characterization. There is no specific instruction that says BOA has to approve the identity of payees on the HUD-1. That is why BOA qualified the statement with the modifier "*inter alia.*" The relevant Closing Instruction only says that BOA must approve the HUD-1 before closing. The requirement exists because the HUD-1 happens to contain, among many other things, the list of payees. Moreover, this statement, incidentally, only applies to a criticism of the Enid closing. No claim about unpaid



1 *See also Calhoun Co v Blue Cross Blue Shield of Mich,* 297 Mich App 1, 13; 824 NW2d 202 (2012).

2 *See also Kamalnath v Mercy Memorial Hospital*, 194 Mich App 543, 549; 487 NW2d 99 (1985)(stating that a party seeking to enforce a contract has the burden of proving its existence.)

3 *Geroulx v Carlson*, 176 Mich App 484, 491; 440 NW2d 644 (1989) citing *Siegel v Spinney,* 141 Mich App 346, 350; 367 NW2d 860 (1985)

payees was made about the Heron Ridge closing. This means the Complaint is silent as to any justiciable breach of a Closing Instruction pertaining to that property.

Westminster Title directed Interrogatories to BOA in the Trial Court requesting it specifically describe the "factual basis" for the allegation in Paragraph 119 given its vagueness. BOA refused to answer:

> **"ANSWER:** Bank of America objects to this interrogatory because it seeks a legal conclusion. Bank of America further objects to this interrogatory because it is compound and represents multiple interrogatories. Bank of America further objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and/or other work product doctrine."(197 JA, Interrogatory no. 34).

The Trial Court was not amused with this answer which was included as an exhibit to Westminster Title's original Motion for Summary Disposition. (193 JA). It ruled that the only contract that existed was the CPL and any claim had to be based on that. It threw out BOA's contract claim. It was clear at that time the Trial Court did not believe the contract asserted by BOA in its arguments was contained in the Complaint (or in its Answers to Interrogatories) or in real life. The Trial Court's holding that Westminster Title's obligations were limited to the requirements of the CPL at (1) (a), (b) and (c) was the subject of this comment by BOA in its Appeal Brief:

> "In its summary order at page 2, the Circuit Court ruled that First American had not breached paragraph 1 of the CPL. In fact Bank of America did not argue that any breach of paragraph 1 of the CPL was the basis upon which First American had an obligation to indemnify Bank of America. *See* App'x 5 at 8-19. Rather, in responding to First American's motion,. Bank of America relied solely upon the paragraph 2 of the CPL."

(1126 JA, p. 19, emphasis supplied). Later, at page 34, BOA further refined its position:

> "Westminster Title's response to Bank of America's motion for reconsideration Suggest that Westminster Title also fails to fully comprehend the fact that Bank of America's breach of closing instruction claims are distinct from it CPL claims. Instead of addressing this issue, Westminster title focuses solely on the plainly irrelevant evidence of Westminster Titles' fraud or dishonesty. Similarly, in a telling display of criticism of its counterpart, Patriot Title, Westminster Title seeks to distinguish itself from Patriot Title's egregious displays of dishonesty, notwithstanding the fact that such a distinction matters not at all with regard to Bank of America's breach of closing instructions claim. (Emphasis supplied).

Put together, these two quotations mean (1) If the Trial Court is correct and the obligations of the parties are contained in the Closing Protection Letters, BOA concedes it has no claim for breach of contract against Westminster Title; and (2) the claim for breach of contract is not based upon fraud/misrepresentation. The claim of BOA must, therefore, be for breaches of obligations other than those contained in the CPL. What would be the basis of such a claim? What do they require? Where they pled? Short answer is they are not pled (most certainly as to Heron Ridge) and they do not exist, anywhere

While it can be said that Westminster Title agreed to follow the Closing Instructions of BOA, it cannot be said that Westminster Title agreed to substitute its judgment for BOA regarding the question of the acceptability of the buyer as a mortgage risk. Westminster Title did not agree to police and stop a fully manifested fraud from doing its damage. Westminster Title was hired to do what the Closing Instructions said it was to do. It was no accident that the requirements of the Closing Instructions dovetail with the obligations of the closing agent described in section 1 (a) of the CPL. This Court may be reluctant to say that the source of the duties of the agent to BOA are contained in the CPL because of principal-agency law, but the enumerated duties are the well-known and notorious jobs of the closing agent and that is so whether or not there is a CPL in

existence. Westminster Title did its job pursuant to the requirements of the Closing Instructions. The ultimate proof is that BOA had first position when it bid for the foreclosed properties without any setoffs for superior liens. If there was a contract in this case, it dealt with something other than mortgage fraud.

Westminster Title requests this Court carefully analyze what was said in the Complaint. The allegations do not describe a viable contract against Westminster Title for either property. The Complaint aside, the facts demonstrate there was no contract between BOA and Westminster Title.

## II. PLAINTIFF-APPELLANT FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING ANY VIOLATION BY THE CLOSING AGENT OF THE TERMS OF THE LENDER'S WRITTEN CLOSING INSTRUCTIONS.

Despite significant discovery in this case, a grand jury investigation, and its own internal investigation, BOA failed to produce any evidence sufficient to create a genuine issue of material regarding any violation by Westminster Title's closing agents of the terms of BOA's written Closing Instructions. Restated; even if this court was satisfied a contract existed, there is no breach. Westminster Title did exactly what it was asked to do: it closed the real estate transactions that had been approved by BOA. The frauds for both properties were committed before Westminster Title ever received the Closing Instructions.

The fraudulent mortgage schemes had variations. Essential to these frauds was the participation of an insider to the transaction. With that insider's assistance, the mortgage applicant

(buyer), a gullible individual with good credit and a willingness to look the other way to make a quick buck, would successfully apply for the mortgage with false information. Once approved, a closing would be scheduled. During the closing, the funds would be exchanged and the fraud completed. To the eyes of Westminster Title, it was "business as usual." It closed up to 30 mortgages per day. The buyer, faced with a substantial mortgage in excess of the market value of the house, was, of course, unable to make the payments.

The linchpin in these fraud schemes was the lack of underwriting diligence on the part of BOA. The "stated value loans" were called "liar loans" in the "Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, in the chapter entitled *Underwriting Standards: "We're Going to Have to Hold Our Nose."*. [1449,1451 JA]. BOA had numerous opportunities to discover these frauds with a minimum of work. For example, it required the applicant to sign a permission slip to so it could obtain the applicant's tax returns from the federal government. Ms. Olson testified that they did not bother to obtain the tax returns. (1309 JA, p. 24). In the end, it would have been as simple as picking up the phone.

Some of these schemes ran deep with behind-the-scenes individuals whose names were not mentioned in connection with the ultimate closing. The individual who recruited Jo Kay James is one such person. His name was Michael Teaney, and he was her banker. (249 JA, pp. 12-15). Mark Conte was taken in by his daughter, Blythe. (858 JA, pp. 14-17). There was another person named Stacey who was involved and ultimately threatened Mr. Conte. (858 JA, pp. 25-26). Carol Walsh from Prime Financial was the "fraud operative" who took care of the details and did the face work at the closings.

It should be abundantly clear at this juncture that Westminster Title had nothing to do with the application or the approval of the fraudulent mortgages for Enid or Heron Ridge. The loan was approved (and the fraud then accomplished) before Westminster Title ever saw the transaction for the first time. The Bank had already issued its approval for the loans as a precondition to sending them out for closing. The loan for the Enid property was approved on December 29, 2005. The closing occurred the following day on December 30, 2005. (0175 JA, Exhibit D) The loan for the Heron Ridge property was approved January 29, 2005, and the closing was held on January 31, 2005. (184 JA, Exhibit E). Not only did Westminster Title obtain the files after the fraud was already completed, it had the files for a very short time. Westminster Title closed the deals in the same manner that it closed literally thousands of properties in the past. Put another way, there was a functional and temporal disconnect between the fraud and Westminster Title's duties described in the Closing Instructions. It is a functional separation because Westminster Title did not participate in either the Application or the underwriting process which is the source of the fraud. It is a temporal separation because Westminster Title did not receive the file until after the fraud was completely perpetrated.

BOA suggests that something untoward happened at the closings, but what? The fraud was the act of submitting the Applications to BOA with lies all over them with the knowledge the Bank would not review them because it had its eye on a hot investment market fueled in part by bundling mortgages and selling them as securities. BOA needed inventory (mortgages) and cut corners to get them. The only thing the wrongdoers had to do was attend the closing and collect the money. The papers were the same for the fraudulent mortgages as they were for the legitimate mortgages.

## III. THE *NEW FREEDOM* DECISION IS A CORRECT RULE OF LAW THAT IS IN ACCORD WITH MCL 600.3280 AND SHOULD BE APPLIED IN THIS CASE AS A COMPLETE DEFENSE TO THE HERON RIDGE PROPERTY AND AS A PARTIAL DEFENSE TO THE ENID PROPERTY.

This argument is undertaken in the event this Court disagrees with the positions already taken by Westminster Title. Westminster Title submits that BOA's damages are significantly limited based on the Court of Appeals decision in *New Freedom, supra.*

The holding in *New Freedom* and its application to this case are in accord with basic principles of equity. A bank that bids the full amount of its loan rather than a lesser amount eliminates bidders. The case before this Court provides an interesting equitable question. BOA was aware of the existence of the fraud soon after mortgages were defaulted. It has asserted in its Brief that one element of the fraud was the fact that the properties were appraised for more than their true market value. This portion of the fraud may not have been easy for BOA to detect but if it had followed up on the income and asset figures in the Applications it would have determined the amounts in the Applications were lies, and the loans would never have been approved. Therefore, when BOA bid the full amount of its mortgage loan, it bid an amount it knew was fraudulent. This had the natural effect of eliminating all competitive bidding. It was what it had loaned but was it the right thing to do? BOA complains of being defrauded in one breath and then complicates matters with its own misdeed by throwing the admittedly fraudulent number in the face of competing bidders.

The power to render deficiency decree in foreclosure proceedings is entirely statutory. *Harrow v Metropolitan Life Ins Co*, 285 Mich 349, 356-357, 280 NW 785 (1938). MCL 600.3280 states:

> When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent. (Emphasis supplied)

If property is purchased at a foreclosure sale for an amount equal to the amount due on the mortgage, the debt is satisfied. *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555; 444 NW2d 217, (2007). The rationale for the rule is well stated in *New Freedom, supra* at page 74:

> Further as a purchaser at the foreclosure sale, IFC and Bankers Trust stood "in the same position as any other purchaser."[4] If a third-party had bid and purchased the properties for the full amount of the mortgages and costs, IFC and Bankers Trust would've received this amount and applied it to the debts. If the third-party then discovered that the properties were worth less than the full bids, it would have no recourse against globe, Commonwealth or Chastain. The *Smith* rule[5] was intended to prevent a mortgagee from receiving a double recovery[6]. Although plaintiff did not actually receive the payments at the foreclosure sales, it assigned both mortgages to IFC for valuable consideration. Therefore, it is already received compensation for the loans. As our Supreme Court has stated, "to allow the mortgagee, after effectively cutting off discouraging lower bidders, to take the property--and then establish that it was worth less than the bid encourages fraud, creates uncertainty as to the mortgagor's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders. --[7] (emphasis supplied)

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4 *Pullyblank v Cape,* 179 Mich App 690, 694; 446 NW2d 345 (1989).
5 *Smith v General Mortgage Corp,* 402 Mich 125; 261 NW2d 710 (1978).
6 *Heritage Federal Savings Bank v Cincinnati Insurance Company,* 180 Mich App 720, 725-726; 448 NW2d 39 (1989).
7 *Smith, supra* at 129, quoting *Whitestone Savings and Loan Association v Allstate,* 28 N.Y.2d 332, 337, 321 N.Y.S.2d 862, 270 N. E 2d 694 (1971).

The possibility of a greater opportunity for fraud is not a desirable outcome in this case. BOA comes up short on the equity side of the ledger. The Michigan Court of Appeals appreciated this and its Opinion should be upheld

## RELIEF REQUESTED

Defendant-Appellee Westminster Title requests this Honorable Court affirm the ruling of the Court of Appeals.

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Dated: March 24, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on March 24, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the TrueFiling system which will send notification of such filing to the attorneys of record.

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